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**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**



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| In the Matter of | ) | |
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| Implementation of the | ) | |
| Telecommunications Act of 1996: | ) | CC Docket No. 96-115 |
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| Telecommunications Carriers' Use | ) | |
| of Customer Proprietary Network | ) | |
| Information and Other Customer | ) | |
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| Implementation of the Non-Accounting | ) | |
| Safeguards of Sections 271 and 272 of | ) | CC Docket No. 96-149 |
| the Communications Act of 1934, | ) | |
| as Amended | ) | |

# BELLSOUTH PETITION FOR RECONSIDERATION

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## BELLSOUTH PETITION FOR RECONSIDERATION

BellSouth Corporation, for itself and on behalf of its affiliated companies (collectively "BellSouth"), hereby submits this Petition for Reconsideration of certain aspects of the Commission's *Second Report and Order*[1] in the above captioned proceeding.

In the *Second Report and Order*, the Commission adopted rules reflecting its interpretation of Section 222[2] of the Communications Act of 1934, as amended.[3] That section addresses uses by carriers of "customer proprietary network information" ("CPNI") that carriers have about their customers' telecommunications services. Among the rules adopted, the

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[1] *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, CC Docket Nos. 96-115, 96-149, Second Report and Order and Further Notice of Proposed Rulemaking, FCC 93-27 (rel. Feb. 26, 1998) ("*Second Report and Order*" or "*Order*").

[2] 47 U.S.C. § 222.

[3] 47 U.S.C. §§ 151 *et seq.* ("the Communications Act" or "the Act").

Commission prohibited carriers' use of CPNI for marketing CPE and information services to their customers, absent affirmative approval of such use from the customer.[4] The Commission also prohibited carriers from using CPNI in "winback" programs after a customer has left for another carrier.[5] Finally, the Commission imposed a set of "safeguards" to "encourage compliance" with the requirements of the *Order*, including a particularly costly and burdensome electronic access documentation/audit trail requirement.[6] For the reasons set forth herein, BellSouth urges the Commission to reconsider these aspects of the *Second Report and Order*.

## I. Introduction and Summary

The Telecommunications Act of 1996[7] was enacted on February 8, 1996. In passing the Act, Congress sought to establish a new "pro-competitive, *deregulatory* national policy framework"[8] that would replace statutory and regulatory limitations on competition within and between markets. Consistent with this "deregulatory" objective, Congress expressly directed the Commission to initiate processes to *eliminate* regulations that are not "necessary in the public interest."[9] Only in limited circumstances did Congress find it appropriate or desirable to direct the Commission to initiate regulatory proceedings to adopt new rules to implement Congressional policy.[10]

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[4] *Second Report and Order* at ¶¶ 71, 77. *See also*, 47 C.F.R. § 64.2005(b)(1).

[5] *Second Report and Order* at ¶ 85. *See also*, 47 C.F.R. § 64.2005(b)(3).

[6] *Second Report and Order* at ¶ 199. *See also*, 47 C.F.R. §64.2009(c).

[7] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("the 1996 Act") (amending the Communications Act of 1934, as amended).

[8] Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess., 1 (1996) ("Joint Explanatory Statement") (emphasis added).

[9] *See* 47 U.S.C. § 161 ("[T]he Commission . . . shall review all regulations . . . [and] repeal or modify any regulation it determines to be no longer necessary in the public interest.").

[10] *See, e.g.*, 47 U.S.C. § 254 (universal service).

Section 222 was not among those provisions. Rather, Section 222 was a "self-executing"[11] provision that reflected no Congressional instruction for the Commission to adopt a comprehensive regulatory scheme for carrier compliance with that section. Nonetheless, more than two years after Section 222 came into effect, the Commission issued the *Second Report and Order*, not only articulating the Commission's interpretation of arguably ambiguous language of Section 222,[12] but also going beyond the language of the statute to impose additional affirmative and onerous implementation requirements.

The *Second Report and Order* is marked by the Commission's recognition that Section 222 is fundamentally a privacy statute.[13] In the face of scant indication from Congress with respect to the precise privacy interest to be protected, however, the Commission appropriately resolves to interpret that section in a manner consistent with customers' reasonable expectations of carriers' likely and permissible uses of CPNI, including consideration of convenience and benefit to the customer.[14] Unfortunately, the Commission has applied that standard in a schizophrenic fashion.

That is, the Commission properly recognizes that customers' expectations of carriers' use of CPNI extend beyond the delivery of the individual, discrete service elements to which a customer subscribes and encompass use in offering improved or related telecommunications services. The Commission also concludes, however, that this expectation does not include use of

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[11] *See Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards; Rules Governing Telephone Companies' Use of Customer Proprietary Network Information*, 11 FCC Rcd 16617, 16619 (1996).

[12] As the Commission notes, the underlying Notice of Proposed Rulemaking in this proceeding was precipitated by "various informal requests for *guidance*" that focused principally on interpretation of the phrase "telecommunications service" as used in Section 222(c)(1)(A). See *Second Report and Order* at ¶ 6 and n.25.

[13] *Second Report and Order* at ¶ 3.

[14] *Id.* at n.144.

CPNI to offer CPE that may be necessary for a telecommunications service to work, or to offer information services related to the telecommunications service and that enable the telecommunications service to work better. In reaching its conclusion, the Commission thus implicitly attributes to Congress (and accepts without supporting legislative history[15]) a hair-splitting of customer expectations on the basis of legal and regulatory service classifications that have no meaning to customers. While lawyers and regulators can draw fine distinctions between categories of services, customers generally do not. There is simply no conceivable rationale for assuming customer expectations to turn on regulatory classifications they neither know about nor understand.

The Commission continues its fractured reliance on customer expectations in its consideration of use of CPNI in "winback" programs. There, the Commission – without record support – concludes that customers would not reasonably expect or desire carriers to use CPNI to propose improved service solutions after the customer has chosen another carrier. In one fell swoop, the Commission thus deprives consumers of the direct benefits of competition, effectively presuming customers do not expect or desire that form of competition.

Finally, having crafted its rules, the Commission assumes carriers will violate them and adopts regulations requiring expensive systems "safeguards" to deter or otherwise track such presumed wrongdoing. There has been no showing, however, that any carrier or group of carriers is deserving of such a presumption. Moreover, the costs of such systems will far outweigh their purported benefits and will ultimately be borne by consumers.

In this Petition, BellSouth urges the Commission to revisit these issues and to eliminate these unnecessary and costly regulatory burdens.

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[15] Indeed, the Commission *rejected* US West's demonstration that Congress originally included and then deleted a provision that would have expressly prohibited the use of CPNI in marketing

## II. The Commission Erroneously Excluded CPE and Certain Information Services From the Reach of Section 222(c)(1)

Among the rules adopted by the Commission in the *Second Report and Order*, Rule 64.2005(b)(1) prohibits carriers from using CPNI to market CPE and information services to a customer without the customer's prior affirmative approval. The basis of Rule 64.2005(b)(1) is the Commission's conclusion that CPE and information services are not part of the customer's "total service relationship" with a carrier embodied in Section 222(c)(1)(A) and are not "services necessary to, or used in, the provision of" telecommunications services pursuant to Section 222(c)(1)(B). These rigid constructions of Section 222(c)(1) inappropriately trivialize the inherent and integral relationship, both from an operational standpoint and from customers' perspectives, between telecommunications "service" and ancillary features and equipment that are necessary to make the service *work*, or work *better*. Accordingly, BellSouth urges the Commission to reverse this impediment to a carrier's ability to act in a manner consistent with its customers' expectations.

### A. CPE and Certain Call-Management Information Services Should be Considered Part of the Customer's Total Service Relationship or, at a Minimum, Services Necessary to or Used in the Provision of Telecommunications Services

The Commission concluded in the *Second Report and Order* that CPE and certain information services fall within *neither* Section 222(c)(1)(A) nor Section 222(c)(1)(B). Consequently, the Commission required carriers to obtain affirmative customer approval before using CPNI to market these products. The Commission's reading of those provisions in the context of CPE and information services is overly literal and at odds with the Commission's own reading of those same provisions in other contexts. Indeed, BellSouth believes that CPE and information services can fall within *either* Section 222(c)(1)(A) or Section 222(c)(1)(B).

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CPE and information services without customer approval. *Second Report and Order*, at ¶ 75 (citing US West Comments at 15, n.36).

In interpreting the meaning of Section 222(c)(1)(A), and particularly the meaning of "telecommunications service" in that section, the Commission relied heavily on its understanding of customers' expectations arising out of their relationships with their serving carriers. Thus, the Commission rightly and reasonably concluded that a customer's service relationship with a carrier (and the consequential scope of the customer's implied approval for use of CPNI) is not defined by the discrete service arrangements to which a customer subscribes. Instead, the Commission concluded that the relationship is defined by "what customers reasonably understand their telecommunications service to include."[16] Further, the Commission was "persuaded that customers expect that CPNI generated from their entire service will be used by their carrier to market improved service within the parameters of the customer-carrier relationship."[17]

These conclusions based on *customer expectations* thus formed the underpinnings of the Commission's "total service relationship" approach for carrier use of CPNI in selling services across telecommunications service categories. In contrast, however, the Commission abandoned the customer expectation approach to defining the total service relationship when the service involved CPE or an information service. Instead, the Commission lapsed into a rigid, statutory-definition approach, summarily concluding that "inside wiring, CPE, and information service do not fall within Section 222(c)(1)(A) because they are not 'telecommunications services.'"[18] Thus, the Commission effectively dismissed out of hand arguments and showings that

[16] *Second Report and Order* at ¶ 24.

[17] *Id.*

[18] *Id.* at ¶ 45.

customers' expectations are not defined by arbitrary (from a practical perspective) regulatory and legal service/function/product classifications.[19]

In light of the Commission's own acknowledgement that the scope of the customer's total service relationship is defined by "what customers reasonably expect their telecommunications service to include," the Commission must reconsider its conclusion that CPE and information services are excluded by definition from customers' expectations. As a number of parties showed previously, customers do in fact (and do reasonably) consider their telecommunications service to include CPE and information services.[20] Accordingly, the Commission should reconsider its exclusion of these products from the customer's total service relationship with a carrier embodied in Section 222(c)(1)(A).

Even if the Commission does not modify that conclusion, however, the Commission must conclude that CPE and information services are "necessary to, or used in, the provision of" services comprising customers' total service relationships with their carriers, and that approval to use CPNI in marketing these products may be inferred pursuant to Section 222(c)(1)(B). Provision of CPE and information services, like provision of inside wiring and publishing of directories, are services offered by carriers that are necessary to make subscribers' telecommunications service *work*, or work *better*. Accordingly, customers expect carriers to use CPNI to offer these products. Further affirmative approval of such use should not be required.

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[19] The Commission "reject[ed] suggestions" that customers consider CPE and information services to be part of their telecommunications service and otherwise expect carriers to use CPNI in marketing CPE and information services, *Second Report and Order* at ¶ 76, but gave no explanation for that conclusion. Rather, the Commission's reasoning was limited to repetition of one party's contention that CPNI is not necessary for one-stop shopping. This response is a non-answer to the showing by numerous parties that customers do not distinguish among classes or types of products and services. *See id.* at n.287.

[20] *See, e.g.*, comments cited in *Second Report and Order* at n.287.

As with Section 222(c)(1)(A), the Commission erroneously excluded CPE from the reach of Section 222(c)(1)(B) on the basis of an inconsistent and overly rigid reading of that section. Specifically, the Commission held that "CPE is by definition equipment"[21] and is therefore necessarily excluded from the open-ended category of "services" covered by Section 222(c)(1)(B). Application of this rigid categorical approach is inconsistent with specific guidance provided in that very section by Congress, as well as with the Commission's own consideration of other "equipment" (inside wire) under Section 222(c)(1)(B). Reconsideration of the Commission's treatment of CPE in light of its treatment of these comparable services is required.

Congress itself identified publishing of directories as an example[22] of an activity for which use of CPNI is permitted without customer approval under Section 222(c)(1)(B). The mere "publishing" of directories, however, is hardly a useful activity unless the tangible directories are also distributed to users of telecommunications services. Thus, the exception for the "service" of publishing directories in Section 222(c)(1)(B) necessarily involves distribution of the physical product.

This is no different from the *service* a carrier provides to its telecommunications service customers in making available the physical product needed by customers to make the telecommunications services work. This is particularly true in the case of specialized CPE needed for specialized services, such as Caller ID. Without the CPE, the telecommunications service has no utility. Carriers thus perform a desirable and beneficial service for their subscribers by making available the specialized CPE that is necessary for the associated telecommunications service to work. This *service* – this making available the specialized CPE –

[21] *Second Report and Order* at ¶ 71 (emphasis added).

[22] Section 222(c)(1)(B) ("services necessary to, or used in, the provision of such telecommunications service, *including* the publishing of directories") (emphasis added).

is thus a "service necessary to or used in the provision of" the associated telecommunications service. As such, it fits squarely within the reach of Section 222(c)(1)(B), and use of inferred CPNI approval to perform this service is allowed.

The same conclusion is compelled even more by the Commission's own inclusion of inside wire within the scope of "services" covered by Section 222(c)(1)(B). Every aspect of the Commission's consideration of inside wire applies with equal force to CPE. After all, CPE, like inside wire, is simply the tangible equipment that completes the telephone transmission path to the user. Moreover, the Commission notes its previous decision that "[i]n a *physical* sense, inside wiring refers to 'the *customer premises*' portion of the telephone *plant* which connects station components to each other and to the telephone network."[23] There simply is no basis for distinguishing between the copper wires encased in insulated sheathing (with associated coupling devices) and wires and circuitry encased within a molded plastic box. Both physical products (and any associated sales, installation, maintenance, or repair activity) are "services that carriers effectively need and use in order to provide wireline telecommunications services."[24]

The Commission similarly erroneously excluded information services from the reach of Section 222(c)(1)(B). Although the Commission dutifully concluded that information services are in fact "services" under Section 222(c)(1)(B), the Commission nevertheless abandoned its reliance on customer expectation as the guiding interpretive principle for construing that section. Instead, as with CPE, the Commission resorted to an unduly restrictive and literalistic approach, finding that because telecommunications can be provided without information services,

[23] *Second Report and Order* at n. 303 (citing *Detariffing the Installation and Maintenance of Inside Wiring*, 1 FCC Rcd 1190, 1190 n.1 (1986)).

[24] *Second Report and Order* at ¶ 80.

information services are not "necessary to, or used in, the provision of" telecommunications services.[25]

The Commission's restrictive interpretation of the qualifying term "necessary" is at odds with its interpretation of that very same term in another context in the recent past. Interpreting Section 251(c)(6) of the Act,[26] the Commission specifically rejected a "most strict[]" reading of that exact term in favor of a meaning of "used" or "useful," finding that such a reading better comported with the overall purpose of the Act.[27] Construction of the very same term in another provision of the same Act compels the same result. Moreover, in addition to being the reading most consistent with the Act as a whole, the less restrictive reading is also most consistent with the Commission's expressed objective of interpreting Section 222(c) in a manner that reflects customer expectations.

A more flexible reading of Section 222(c)(1)(B) for information services is perhaps most appropriate in the context of carrier provided voice messaging services. From a customer perspective, voice messaging service is simply another tool useful to and used by the customer to manage his or her telephone service. In this respect, it is no different in the customer's mind from other service control techniques, such as call waiting or call forwarding. Like these other services, voice messaging provides the customer a means to control where, when, and to whom they will speak and facilitates receipt and delivery of messages via telecommunications service. Moreover, because of the integral relationship between call forwarding features and voice messaging, customers necessarily perceive these features to be part and parcel of the same offering. Thus, voice messaging is a "service" that, if not considered a part of a customer's total

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[25] *Id.* at ¶ 71.

[26] 47 U.S.C. § 251(c)(6).

[27] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996: Interconnection Between Local Exchange Carriers and Commercial Radio Service Providers*, 11 FCC Rcd 15499, 15794 (1996).

service relationship with a carrier under Section 222(c)(1)(A), is, at a minimum, necessary to or used in the provision of such services.

### B. Rule 64.2005(b)(1) has a Particularly Pernicious Effect on Marketing of Wireless Services

In two previously filed petitions[28] for interim relief from the application of Rule 64.2005(b)(1), the petitioning parties provided a compelling showing that that rule imposes particularly pernicious effects on CMRS carriers.[29] Indeed, the petitions and supporting comments showed that CPE and information services *are* part of the CMRS service provided to customers whether considered from a technological, marketplace, regulatory, or customer perception perspective. Accordingly, a wireless carrier's CPNI may be used to market or provision CMRS service, including handsets and other associated CPE (*e.g.*, batteries and adapter cables) and information services, without obtaining prior affirmative approval from the customer.

From a technological perspective, CMRS equipment must be specifically programmed with appropriate identification information and other authentication and security codes in order to operate with the CMRS network. Further, digital technology provides the capability for delivery of information and data services to CMRS subscribers using the same radio spectrum as voice services. Moreover, as CMRS carriers migrate from analog to digital transmission,

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[28] CTIA Request for Deferral and Clarification, CC Docket No. 96-115 (filed April 24, 1996); GTE Petition for Temporary Forbearance, or in the Alternative, Motion to Stay, CC Docket No. 96-115 (filed April 29, 1996).

[29] Although the adverse effects of Rule 64.2005(b)(1) are perhaps most readily apparent when that rule is applied to wireless carriers, the Commission has properly concluded that Section 222 by its terms applies evenly to all carriers. Thus, BellSouth does not agree with arguments advanced by "pure" wireless interests that CMRS providers alone should be relieved from the burdens of Rule 64.2005(b)(1). Indeed, the impracticality of excusing wireless providers, but not wireline providers, from that rule becomes most evident when considering the combination of both wireline and wireless services in a single service package, which may be offered with CPE that operates as both a wireline cordless set and as a wireless handset. See, *Second Report and Order* at ¶ 58.

customers are *required* to have new compatible equipment. Thus, from a technological perspective, CMRS service and equipment used to provide it are necessarily functionally integrated.

CMRS providers similarly do not make artificial distinctions between various functionalities of their offerings when promoting them in the marketplace. Rather, the marketplace objective is to create a customer perception of a singular service that offers a variety of options all in a neat service package. Indeed, the CMRS service and the associated equipment and other features are so linked in the marketplace that CMRS carriers market their services by touting the features of the equipment or ancillary services.[30]

Moreover, CMRS CPE historically has been considered part of the CMRS offering from a regulatory perspective. Indeed, in order to prevent fraud and theft of service, the Commission prohibits customers without the permission of the cellular licensee, from changing the electronic service number (ESN) programmed into the handset by the manufacturer.[31] Similarly, because CMRS handsets are radio transmitters, their operation is subject to the CMRS provider's Title III spectrum license and authority.[32] Thus, the equipment and service are already treated as an integral whole for many regulatory purposes.

Finally, CMRS services (including voice messaging) and equipment are inseverably intertwined in customers' perceptions. Customers shopping for CMRS service overwhelmingly

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[30] BellSouth included with its Comments on the two interim petitions, examples of CMRS providers promoting "one-button" features or audio messaging capabilities of CPE to promote the associated service. BellSouth Comments, Attachment A, CC Docket No. 96-115 (filed May 8, 1998). Similarly, CTIA cited the example of "dual mode" handsets that allow use of both cellular and PCS spectrum to expand the subscriber's coverage area. CTIA Deferral Petition at 20.

[31] 47 C.F.R. § 22.919.

[32] *See* CTIA Petition for Reconsideration and Petition for Forbearance, 26-27 CC Docket 96-115 (filed May 20, 1998).

go to CMRS retail outlets where they can view and handle handsets as they mull over their subscription choices. Only in the rarest of circumstances (if any) would a customer subscribe to CMRS and then set about to find CPE that would be most useful with the services ordered. Rather, customers view the handset and the package of services ordered as the "service" obtained from the CMRS provider.[33]

Application of Rule 64.2005(b)(1) will seriously disrupt this integrated service relationship. For example, as both GTE and CTIA point out in their petitions for deferral, the effect of the rule would seem to preclude CMRS carriers from using CPNI (absent affirmative approval) to target high usage customers for upgrade from analog to digital service if the digital service offering were packaged with the necessary new digital CPE.[34] Yet, if a consumer's privacy expectation is not infringed by the use of CPNI to identify the customer as a candidate for service upgrade (as the Commission has determined it is not), one is hard pressed to understand how such an infringement will be created simply by inclusion in the service proposal of the CPE necessary to make the service work.

In light of this integrated service relationship and the disruption the application of Rule 64.2005(b)(1) would foster for CMRS carriers in particular, BellSouth urges the Commission to reconsider that requirement.

[33] Indeed, as CTIA points out, this Commission, DOJ, and FTC all have concluded that consumers not only expect, but *benefit*, from marketing of CMRS and associated CPE as a single package. CTIA Petition at 18-19.

[34] As discussed below, the Common Carrier Bureau's recent clarifying order provides only very limited relief from this effect.

### C. The Common Carrier Bureau's Recent *Clarification Order* Provides Insufficient Relief.

In a recent *Clarification Order*[35] addressing issues on which it had been receiving inquiries, the Common Carrier Bureau clarified certain circumstances under which carriers may use CPNI in marketing service bundles that include CPE or enhanced services. The clarifications offered by the Bureau provide little actual relief, however, and, instead, serve to reinforce that the lines drawn by the Commission in the *Second Report and Order* do not reflect customer expectations.

In the *Clarification Order*, the Bureau confirms that carriers who have sold customers bundled offerings that combine a telecommunications service with CPE or with an information service may use CPNI derived from the telecommunications service portion of the bundle when "upselling" the customer a comparable bundle. The Bureau notes, however, that this clarification does not alter existing restrictions on wireline carriers' bundling opportunities.[36] Thus, what this "clarification" fails to reach is the expectations of customers who have bought wireline telecommunications services and CPE or information services *concurrently*, even if not as a regulatorily defined "bundle."

For example, when customers subscribe to Caller ID service from a wireline carrier, they may simultaneously choose to obtain the necessary display device from the carrier. Although Commission regulations require the carrier to offer these components separately, from the perspective of the customer, only a single purchasing decision has been made. This customer's expectation is no different from the customer who has bought a "bundle" of service and CPE. Yet, because the originally sold "package" was not a "bundle," the carrier is restrained from

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[35] *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and other Customer Information*, CC Docket 96-115, Order, DA 98-971 (rel. May 21, 1998) ("*Clarification Order*").

[36] *Clarification Order* at n.14.

using CPNI derived from a subscription to caller ID service, for example, to target customers for an offering of Call Waiting Deluxe (which itself requires specialized CPE) to the extent the latter offering is considered also to be the promotion or marketing of the necessary CPE. Regulatory restrictions on use of CPNI that turn on such nuances as "packages" or "bundles" or on whether a promotion of a service that requires specialized CPE is a promotion of the CPE itself do not serve customers' interests because they rest on distinctions that do not make a difference to customers. The Commission should move on reconsideration to rectify such nonsensical results.

Even when considered from the perspective of CMRS carriers that do have greater opportunity for bundled offerings, the clarification seems to turn on non-meaningful criteria. For example, the Bureau indicates that if a customer did not originally purchase CPE from a carrier, that carrier cannot use CPNI without prior approval to market a bundled offering to that customer. In the CMRS world, where customer churn runs about 30% annually, carriers are frequently providing service to customers to whom they did not originally sell the CPE. (Indeed, the CPE may originally have been bought from another carrier as part of a bundled offering.) The import of the Bureau's order seems to be that a cellular carrier providing analog service to its customers and wanting to offer a promotion of digital service can use CPNI without affirmative approval to offer a promotional bundle that includes digital equipment - but only to customers who originally bought analog equipment from the carrier. That same carrier could not use CPNI without affirmative approval, however, to offer the same promotional bundle to current customers who bought their equipment elsewhere. The Bureau's order thus effectively forces CMRS carriers to discriminate among its customers on the basis of the customer's source of CPE – an odd outcome to say the least.[37]

[37] The alternative, in order to avoid discrimination, would be to not offer bundled promotions to any customers – a result contrary to the way CMRS service has long been marketed and delivered.

Finally, the *Clarification Order* seems to assume that carriers know when they are the customer's CPE provider. Many carriers, however, including BellSouth, do not regularly retain records of customers to whom they have sold CPE. Indeed, it is quite possible for BellSouth to have sold a service and equipment bundle to a customer, for the customer to have gone to another carrier (using the same CPE) at the expiration of the service agreement with BellSouth, and for the customer later to return to BellSouth with the same CPE for another service period. BellSouth has no way of identifying the original source of the CPE. While on the surface this is a mere administrative matter, the real issue is why the source of the CPE should matter *to the customer* in terms of the customer's expectation of hearing proposals from the carrier for service upgrades that also include the necessary, new CPE. BellSouth submits that it does not matter to the customer, and the Commission's rules should be modified to conform to these customer expectations.

## III. The Commission's Decision to Prohibit Use of CPNI in "Winback" Circumstances is Not Supported by the Act or by Public Policy and Must be Reversed

In a decision with far-reaching effects that was relegated to less than a paragraph of discussion in the *Second Report and Order*, the Commission gratuitously opined that Section 222 prohibits carriers' use of CPNI to develop competing service offerings for customers who have chosen another carrier.[38] Such a prohibition is antithetical to the Act's overarching goal of facilitating and stimulating competition between carriers. The prohibition does nothing but deprive American consumers of the benefits of actual head-to-head competition. Further, the prohibition improperly deprives carriers of the beneficial use of their business assets. Accordingly, the Commission must eliminate this prohibition on reconsideration.

[38] *Second Report and Order* at ¶ 85.

Since the 1996 Act was passed, this Commission has noted an untold number of times that Congress's purpose in passing the Act was to establish a "*pro-competitive*" national policy framework. Indeed, in this very *Order*, the Commission confirmed that "[t]he 1996 Act was meant to ensure, *to the maximum extent possible*, that, as markets were opened to competition, *carriers would win or retain customers on the basis of their service quality and prices.*"[39] Inexplicably, however, the Commission has conjured up a prohibition on use of CPNI that will retard carriers abilities to do just that precisely at one of the most crucial moments of competition, *i.e.*, when a customer is on the precipice of choosing between competing offers.[40] This result is inimical to the objective Congress was seeking to achieve.

The Commission's statutory construction underlying this prohibition fails to take into account both this objective of Congress and the reasonable expectations of the customer. The Commission thus erroneously concludes that a customer's expectation that a carrier will use CPNI to compete to win or retain the customer's business by proposing improved service arrangements is automatically extinguished merely because the customer has chosen another carrier. That a customer has left a carrier or signaled an intention to leave the carrier does not support the Commission's interpretation that the customer no longer expects the former carrier to have access to CPNI. Indeed, that a customer has changed carriers or announced plans to change carriers is indicative of the customer's desire to obtain service from the carrier that can offer the best telecommunications solution for that customer's needs. A customer demonstrating a willingness to change carriers to achieve a better solution is a customer demonstrating a

[39] *Id.* at ¶ 66 (emphasis added).

[40] As adopted, Rule 64.2005(b)(3) refers only to "former customers," while the text of the *Order* suggests the prohibition is intended also to reach "soon-to-be former customers." In either case, as long as the carrier is relying in information derived from its own relationship with its customer and not on information protected under Section 222(a) or (b), the carrier should be able to use CPNI to "win[back] or retain customers on the basis of the [the carrier's] service quality and prices."

willingness to entertain offers to change carriers again. The Commission should not impose artificial constraints on the use and flow of information in a competitive market on the basis of unsupported assertions that customers expect and would be satisfied by something less.

Finally, in addition to defeating customers' expectations, the prohibition constitutes an impermissible taking of property without just compensation in violation of the Fifth Amendment. Specifically, the restriction operates to deprive carriers of lawful use of their business assets without just compensation.[41] CPNI has value to the carrier based on the investment expended to generate, collect, compile, and protect it and on its potential use in the generation of future revenues. Restricting a carrier from using this information to contact former customers deprives carriers of the realization of that value. Accordingly, the prohibition arises to an impermissible taking and must be rescinded.

## IV. The Access Documentation/Audit Trail "Safeguard" Imposed by the Commission Is Not Required by the Act, Is Costly and Burdensome to Implement, Does Not Serve the Public Interest, and Should be Eliminated

In the *Second Report and Order*, the Commission rightly concluded that the "access restriction" method of guarding against improper use of CPNI by carriers was inappropriate under Section 222. Instead, the Commission concluded that "use restrictions . . . coupled with personnel training . . . [will] promote customer convenience and permit carriers to operate more efficiently with less regulatory interference."[42] BellSouth agrees that use restrictions better serve these objectives than do access restrictions. However, the specific safeguards as adopted by the

[41] *Compare, Clarification Order* at ¶ 9 ("If the definition of CPNI included a customer's name, address, and telephone number, a carrier would be prohibited from using its business records to contact any of its customers to market any new service that falls outside the scope of its existing service relationship with those customers.")

[42] *Second Report and Order* at ¶ 197.

Commission – particularly the "access documentation/electronic audit" requirement – have the potential to impose inordinate burdens on carriers at extremely high costs and produce no cognizable benefits. BellSouth urges the Commission to lift these needless and costly regulatory burdens.

As noted at the outset, the Act imposed no responsibility on the Commission to adopt CPNI rules in the first instance. The Act is also noticeably void of direction to the Commission to establish regulations governing *how* carriers will comply with their statutory or regulatory obligations. Nor was there any evidence in the record of past abuses by carriers previously subject to CPNI rules or of likely (as opposed to purely *speculative*) infractions of the new rules. Nevertheless, in spite of this overwhelming absence of any apparent need, the Commission deemed it necessary to "encourage compliance" with the new rules by "requir[ing] that carriers maintain an electronic audit mechanisms that tracks access to customer accounts."[43]

BellSouth urges the Commission to reject its apparent hypothesis that no carrier will comply with requirements adopted in this proceeding absent mandatory electronic audit trails. As unfortunate as it is that a small minority of carriers have shown a tendency in other contexts (*e.g.*, slamming) utterly to disregard the Commission's requirements and their own responsibilities to their customers, the Commission should not indict the whole industry with presumptions of wrongdoing. BellSouth, along with the vast majority of other carriers, have long histories of dealing honorably with their customers and with information about their customers. There simply has been no tangible showing in this proceeding that unnecessarily complex and expensive electronic audit trail mechanisms are all of a sudden needed to ensure that these carriers behave responsibly with respect to USE OF information about their existing customer relationship.

[43] *Id.* at ¶ 198.

In addition to the absence of any apparent need for the audit trail requirements, the Commission also should eliminate that requirement because the Commission's own apparent expectations of the costs and benefits of such a mechanism are grossly off base.

To be sure, it is clear from the *Order* that the Commission did not *intend* to adopt a burdensome and costly implementation requirement. For example, the Commission expressly represented that while the "new CPNI scheme will impose *some* additional burdens on carriers . . . [w]e believe . . . that these requirements are *not unduly burdensome*."[44] The Commission revealed similar expectations when it discussed comparative cost differences between use restrictions and access restrictions, noting that "mechanical access system[s] [are] expensive to establish and to maintain" and, further, that even "the increased protection afforded through access restrictions . . . would [not] justify the additional expense of such a system."[45] Finally, the Commission expressed in no uncertain terms the expectation that the new "access documentation [requirements] will not be overly burdensome."[46]

Unfortunately, these stated expectations of the nature of costs of access documentation requirements do not square with reality. The Commission requires that the access documentation mechanism be "capable of recording whenever customer records are opened, by whom, and for what purpose."[47] The sole basis of the Commission's assertion that such a requirement will not be burdensome seems to be the generalization that comparable capabilities may be used by carriers to track systems usage for various internal accounting or resource management purposes.[48] The fact is, however, that existing mechanisms for managing access to and use of

[44] *Id.* at ¶ 194 (emphasis added).

[45] *Id.* at ¶ 197.

[46] *Id.* at ¶ 199.

[47] *Id.* at ¶ 199.

[48] *Id.* As support for its sweeping conclusion, the Commission cites an *ex parte* submission by US West describing in two *very* general sentences the nature of systems access control

various carrier *systems* are ill suited for tracking the level of detail of access to and use of *individual records* suggested by the new rules.

Indeed, the costs of developing and implementing the access documentation requirement appear to be on par with (if not greater than) the costs of developing and implementing an access restriction safeguard that the Commission found to be excessive and unjustifiable.[49] Although BellSouth is still assessing the overall scope of the obligations created by the Commission's requirement, preliminary estimates are that the five-year implementation costs will easily exceed $75 million for BellSouth alone.[50] This figure approaches the $100 million the Commission could not find justifiable for an access restriction requirement and is more than 100 times the $700,000 that the Commission seems to have found more palatable for a use restriction requirement.[51]

In contrast, even if implemented, the access documentation requirement will not materially serve the purposes for which it was adopted. The Commission cites several purported "benefits" that the audit trail requirement is intended to produce. First, the Commission suggests that the electronic audit mechanism will "encourage compliance" and "ensure a method of

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mechanisms it employs. *Id.* at n.692 (citing US West *ex parte* (filed Nov. 14, 1997)). Such vague and non-specific representations provide a wholly inadequate basis for the inference of the scope of that drawn by the Commission. Moreover, the US West submission was addressing mechanisms for controlling access to *systems*, not for generating an audit trail of access to individual customer records.

[49] *Second Report and Order* at ¶ 197 and n.687.

[50] A substantial portion of this total reflects the data storage costs associated with the "contact history" retention requirement. In some circumstances, this requirement will require development of a data retention system larger than the systems from which the customer information was obtained. Moreover, in addition to the pure monetary costs involved, the requirement imposes substantial burdens on carriers' information technology organizations that are already laboring under other heavy implementation obligations, such as Year 2000 readiness and local number portability.

[51] *See, id.* at n.687.

verification in the event of a subsequent dispute."[52] The Commission asserts that the requirement "will discourage unauthorized, 'casual' perusal of customer accounts" and would "afford a means of documentation that would either support or refute claimed deliberate carrier CPNI violations."[53] Finally, the Commission claims that retention of these audit records for a year will "ensure a sufficient evidentiary record for CPNI compliance and verification purposes."[54] None of these "benefits" can be assured by the present requirement, however.

The principal fallacy in the Commission's expectation is that the requirement, even if implemented, would provide little, if any, indication of whether CPNI was actually being used properly. Clearly, any individual who deliberately violates the CPNI use restrictions will not reveal the true purpose of his or her access to customer records.[55] Hence, any system that records such a purpose will provide little insights of the actual use and thus will neither "ensure a method of verification in the event of a subsequent dispute" nor "support or refute claimed deliberate carrier CPNI violations." The point is, access documentation that records the user's claimed purpose will have little probative value of the user's actual use of the CPNI accessed. Thus, to the extent the Commission perceives an access documentation mechanism to create an automatic and verifiable record of proper versus improper uses of CPNI, the Commission is mistaken as to the capabilities of such a mechanism.

In light of this inability of an access documentation system to achieve the purposes for which the Commission required it, coupled with the massive costs that carriers would incur to implement and maintain a system that will not produce the desired results, it is incumbent upon

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[52] *Id.* at ¶ 199.

[53] *Id.*

[54] *Id.*

[55] Systems cannot automatically record the purpose for which records are accessed since that is a subjective fact known only to the system user. An individual intending to use CPNI for an impermissible purpose is unlikely to record the truly intended use.

the Commission to eliminate this regulatory burden as clearly not necessary in the public interest.

Elimination of the access documentation requirement will not leave customers' records open to uncontrolled abuse. As the Commission noted in the *Order*, "use restrictions . . . can and will be effective when coupled with personnel training."[56] Consistent with the Commission's requirements, BellSouth is diligently working to implement the "flagging" of customer service records that appear on service representatives' screens to indicate the CPNI status of individual customers. Moreover, BellSouth has already undertaken extensive training of all employees with access to CPNI as to when and how they can or cannot use CPNI. BellSouth management takes these responsibilities seriously, and employees are instructed that misuse of CPNI is subject to disciplinary action, including termination of employment.[57] Unless and until any record of CPNI misuse develops,[58] the Commission should avoid imposition of costly and ineffective safeguards and should instead allow carriers to implement these less costly protections. Accordingly, BellSouth urges the Commission to eliminate its access documentation/audit trail requirement.

[56] *Second Report and Order* at ¶ 197.

[57] Indeed, BellSouth has a longstanding policy and practice of handling all customer information and other confidential or proprietary materials with appropriate care. Although the new rules may alter the range of permitted uses of certain information, they do not change BellSouth's commitment to abiding by the rules.

[58] *See, Second Report and Order* at n.688 (rejecting the access restriction requirement: "Should a record of CPNI misuse develop, however, we can and will revisit our conclusion.")